



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: RAI, Inc.
File: B-222610
Date: August 5, 1986

DIGEST

Small Business Administration failure to follow Federal Acquisition Regulation requirement to prepare a request to the contracting agency that an effort be committed to the section 8(a) program, and the resultant failure by the contracting agency to evaluate such request, do not provide a basis to object to the placement of the contract in the 8(a) program, since the infringed provisions only provide information and guidance and the record indicates that required procedures were followed in substance.

DECISION

RAI, Inc., protests the Department of Education's alleged violation of regulations in placing a contract for materials storage/mailling services with the Small Business Administration (SBA) under section 8(a) of the Small Business Act (Act), 15 U.S.C. § 637(a) (1982). RAI, the incumbent contractor and a small business, complains that award of any subcontract under the 8(a) program is improper. We deny the protest.

Section 8(a) of the Act authorizes SBA to enter into contracts with government agencies, and SBA performs these contracts by awarding subcontracts to socially and economically disadvantaged small business concerns. SBA and the contracting agencies enjoy broad discretion in arriving at section 8(a) contracting arrangements, so that we confine our review of their actions to two areas: whether applicable regulations have been followed, and whether there has been fraud or bad faith on the part of government officials. Automation Management Consultants, Inc., B-221821, May 16, 1986, 86-1 C.P.D. ¶ 467.

RAI contends that Education's placement decision was improper because Education did not follow the Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 19.8 (1984), concerning 8(a) subcontractor selection. RAI alleges three specific violations; SBA did not prepare a request for commitment, required by FAR, 48 C.F.R. § 19.803, and Education consequently did not prepare an evaluation of the request for commitment, required by FAR, 48 C.F.R. § 19.804(a), or send SBA a notice of the results of the evaluation of the request for commitment, required by FAR,

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48 C.F.R. § 19.804(b). In this respect, RAI argues that Education is not authorized to perform SBA's functions of identifying potential 8(a) candidates and evaluating their respective business plans.

As preliminary matters, Education urges dismissal of RAI's protest either as untimely, because it was not filed within 10 working days after April 25, 1986, when RAI knew of the intended 8(a) placement, see 4 C.F.R. § 21.2(a)(2) (1986), or on the ground that Education has a pool of three capable 8(a) contractors so that RAI, not being an 8(a) firm, is not an interested party. See 4 C.F.R. § 21.0(a).

We reject Education's arguments. First, the protest is timely since its basis is the alleged failure to adhere to required preliminary steps (preparation of three specific documents) in arriving at the 8(a) placement decision. RAI claims that it was unaware of such failure until shortly before protesting, when an Education employee orally advised RAI that the documents, which the firm had requested through the Freedom of Information Act (FOIA), did not exist.

Second, if we find that RAI is correct and recommend that the advisability of the 8(a) placement decision be, in effect, reevaluated, it is possible that Education would decide against an 8(a) placement, in which event RAI would be in the class of prospective competitors. Consequently, RAI is an interested party. Wespercorp, B-220665, Feb. 18, 1986, 65 Comp. Gen. ___, 86-1 C.P.D. ¶ 167.

As to the protest's merits, Education admits that it did not prepare the three documents. Education reports, however, that it followed a frequently used procedure of both proposing specific work for 8(a) placement and recommending a specific 8(a) firm to perform the work to SBA. When SBA agrees with the recommendation, it nominates the same firm to provide the services to Education under the 8(a) program. This procedure obviates the need for SBA to prepare a request for commitment, for Education to evaluate such a request, and for Education to advise SBA of the results of the evaluation. Finally, Education contends that SBA's acceptance of Education's recommendations cures any arguable procedural defect. We agree with Education's position.

We have recognized the propriety of contracting agencies acting on behalf of SBA in selecting contractors for award. Health Services International, Inc., B-205060, May 25, 1982, 82-1 C.P.D. ¶ 495. In such circumstances, we review contracting agencies' actions under the criteria applicable to SBA actions. Arawak Consulting Corp., 59 Comp. Gen. 522 (1980), 80-1 C.P.D. ¶ 404. Moreover, we have held that provisions such as the ones in issue here, do not, for the most part, impose regulatory requirements on contracting agencies. Instead, they are set out primarily as a matter of information and guidance as to how SBA and contracting agencies will place 8(a) contracts. Kings Point Manufacturing Co., Inc., 54 Comp. Gen. 913 (1975), 75-1 C.P.D. ¶ 264 (interpreting an earlier version of the same provisions). Here, it is clear that appropriate SBA and Education officials agreed with the propriety and

utility of placing the contract in the 8(a) program, so that even if the exact procedures mentioned in the FAR were not used, they were, in our view, followed in substance. See Exquisito Services, Inc., B-222200.3, July 17, 1986, 86-2 C.P.D. ¶ ____.

The protest is denied.

for *Seymour Gross*
Harry R. Van Cleve
General Counsel